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IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES., ET AL.,
Petitioners,
v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE JUVENILE LAW CENTER & THE NATIONAL CENTER FOR YOUTH LAW AS *AMICI CURIAE*

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INTEREST OF THE *AMICI*[1]

Juvenile Law Center ("JLC") is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

The National Center for Youth Law seeks to help children escape from poverty and to use the law to protect children from the debilitating effects that poverty has on them. Since 1970, we have worked to improve the lives of poor children nationwide. Throughout our work, we devote particular attention to those children who are at the greatest risk, including children of color, disabled children, abused and neglected children, and adolescents. We provide direct representation of children and adolescents through impact

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person, entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation of this submission.

litigation; legislative and administrative advocacy at the national and state levels; and training, technical assistance, and support for child advocates, social services and health care providers, and other professionals who work with children and youth. As advocates for children: we protect abused and neglected children through work with foster parents and others striving to reform state child welfare systems; we work to expand access to federally funded health care services to which low-income children and youth are entitled; we strive to secure public benefits to meet the special needs of children and youth, including TANF benefits for teenagers, and SSI benefits for disabled children and youth; we work to improve California's child support collection program through public information and advocacy; and we work to combat the tendency to respond to the problems of adolescents in a manner that is almost exclusively punitive.

Amici believe that youth in the foster care system, particularly those with special needs, are entitled to treatment that is equitable and ensures and promotes their well-being. *Amici* urge the Court to affirm the Supreme Court of Washington's ruling that Washington State's reimbursement provision violates the Supremacy Clause and the Social Security Act.

SUMMARY OF ARGUMENT

DSHS's implementation of the cost recovery mandates of Wash. Rev. Code § 74.20.010 and Wash. Admin. Code § 388-25-0210 violates the Supremacy Clause of the U.S. Constitution, U.S.C.A. Const. Art. 6, cl. 2. The cost recovery provision conflicts with the Social Security Act and related regulations which require that: 1) the representative payee disburse the beneficiary's Supplemental Security Income benefit or Social Security benefit based upon the best interests

of the beneficiary and 2) the representative payee act as a fiduciary to determine the beneficiary's best interests based on an individualized determination. In addition, a Supremacy Clause violation exists because Washington's cost recovery laws stand as an obstacle to Congress's goal that Supplemental Security Income ("SSI") meet the needs of youth who are cumulatively disadvantaged by poverty and disability. Accordingly, DSHS should be ordered to amend its policies and procedures to comply with federal law.[2] *See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983)(holding that state law is preempted if it actually conflicts with federal law).

ARGUMENT

This appeal concerns economically disadvantaged and disabled children entrusted to the care of a state agency through its foster care system – among the neediest children in America. At issue is whether the state of Washington, in its representative capacity as recipient of these children's federal insurance benefits under Title II and Title XVI of the Social Security Act, may lawfully allocate the entire benefit amount to the state treasury to reduce its financial burden of maintaining its state foster care system – where the Social

[2]Policies enacted by the Illinois Department of Children and Family Services pursuant to the settlement agreement in *Willingham v. McDonald*, No. 96 CO 00120, (Cook County, Ill., Sept. 2000), demonstrate how states may properly serve as representative payees and also comply with the mandates of the Social Security Act. These policies were put in place to ensure that the child's benefits were managed in a way consistent with the best interests standard rather than the state's financial interest. Such policies do not preclude the state from seeking some reimbursement for the cost of foster care, but do make clear that a beneficiary's special needs must be prioritized in determining how benefits will be used.

Security Act mandates that the representative payee spend these funds in accordance with the children's best interests.

Amici submit that Washington's self-reimbursement practice, mandated by Washington law, violates both express provisions of the Social Security Act as well as the policy and goals of the Act. By effectively balancing the state's foster care budget on the backs of poor and disabled children, Washington subverts the intent and mandate of Congress. Washington's statutory scheme violates the Supremacy Clause of the United States Constitution.

I. TITLE II AND TITLE XVI OF THE SOCIAL SECURITY ACT CREATED BENEFITS FOR DISABLED CHILDREN AND THE CHILDREN OF DISABLED ADULTS TO ADDRESS THE SPECIAL NEEDS OF THESE TWO GROUPS

In 1935, Congress created Federal Old-Age, Survivors, and Disability Insurance Benefits, designated as Title II of the Social Security Act. In 1939, Congress extended Title II insurance benefits to cover children with a parent who is currently entitled to old-age or disability insurance and children with a parent who died with full or current eligibility for such insurance benefits. *See* 42 U.S.C. § 402(d)(1). The Title II program aims to prevent economic hazards created by a wage earner's involuntary, premature retirement. *See Mathews v. de Castro*, 429 U.S. 181, 186 n.6 (1976). Thus, the insurance benefits replace parental income no longer available to the child due to the disability of a parent, old-age, or death. Eligibility is not based on a determination that the child has a disability.

The Social Security regulations consider current maintenance an appropriate use of these insurance benefits. 20

C.F.R. § 404.2020(a)(1). Current maintenance includes not only food, shelter, and clothing, but *medical care*, and personal items as well. *See id.*

Title XVI is a public assistance program based on economic need and a finding of individual disability. Congress amended the Social Security Act in 1972 to create a single national program that would provide cash assistance to those unable to sustain the costs of essentials such as food, clothing, and shelter, due to an inability to engage in substantially gainful employment. *See* H.R. Rep. No. 92-231, pp. 146-147 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5133 pt. 2. Like Title II, Title XVI restores lost income to would-be adult wage earners.

As the new statute took shape, Congress recognized another group of non-wage earners with serious unmet needs related to their disability: children. As Justice White has observed, this inclusion gave rise to "different purposes underlying the disability programs for the two groups." *Sullivan v. Zebley*, 493 U.S. 521, 546 (1990) (White, J., dissenting)(arguing that the Social Security Administration's approach to determining SSI eligibility for adults permissibly and logically differs from the eligibility standards for children because of Congress's separate aims in providing benefits to these two groups).

Congress carefully distinguished between adult SSI, which would provide basic care funds to support those unable to work, and child SSI, which would serve the preventative purpose of meeting the special needs of children doubly vulnerable by reasons of poverty and disability in order to promote successful transitions to adulthood. *See id.*

As Congress explained, the inclusion of children was

neither incidental nor a simple extension of benefits to a wider age demographic: "[D]isabled children who live in low-income households are certainly among *the most disadvantaged of all Americans* and they are *deserving* of special assistance in order to help them become self-supporting members of our society." H.R. Rep. No. 92-231, pt. 2, at 5133-34.

SSI's goal of addressing the special needs of disabled children is reflected in the duty of the payee to direct the funds to disability-related needs. Like Title II, Title XVI requires that a representative payee use the funds for current maintenance, including medical care not covered by Medicaid. *See* 20 C.F.R. § 416.640(a).

Indeed, a representative payee under Title XVI *must* obtain medical treatment for the child[3] and, under certain circumstances, must create a dedicated account to cover items such as education and services related to the child's impairment.[4] The recent creation of these dedicated account

[3]The Social Security Act requires that payees for SSI recipients ensure that the beneficiary is and has been receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits. 20 C.F.R § 416.994a(i); 20 C.F.R. § 416.635.

[4]In addition to the best interests duty and the medical treatment requirement, Title XVI also obliges the representative payee of an individual under age eighteen who receives a lump-sum payment of past-due benefits that exceeds six times the amount of the monthly benefit to deposit this amount in a "dedicated account" in a financial institution. 42 U' S.C. § 1383(a)(2)(F)(i). The representative payee may also deposit any subsequent past due benefits into this account. 42 U.S.C. § 1383(a)(2)(F)(iii). The representative payee's discretion in the use of funds in a dedicated account is limited; the payee must use the funds only for allowable expenses related to the impairment of the individual, including education or job skills training, personal needs assistance, special equipment, housing modification, medical treatment, therapy or rehabilitation, or any other impairment-related item that the Commissioner deems appropriate. 42 U.S.C. § 1383(a)(2)(F)(ii)(II)(aa-gg).

provisions demonstrate Congress's continued effort to ensure that SSI funds allow a child to obtain the necessary resources that will improve his or her disabling condition. In fact, the dedicated account provisions came as a reaction to, and rejection of, the practice of DSHS and other state agencies to apply lump sum benefits to reimburse themselves for *past* care, contrary to the current maintenance responsibility of the representative payee.

Similarly, Title II Social Security regulations contemplate that a representative payee should conserve some of the beneficiary's funds in savings for reasonably foreseeable needs. In the example provided in 20 C.F.R. § 404.2040(a)(1), the payee sets aside $30 per month, presumably in an interest-bearing account. *See e.g., Mason v. Sybinski*, 280 F.3d 778, 791 (7th Cir. 2002)(The Seventh Circuit observed that the state representative payee took due notice of the individual needs of the beneficiary, saving for her personal use $100 of her monthly benefit of $618, even though the state's monthly costs of care were $7,170.); *King v. Schafer*, 940 F.2d 1182, 1184 (8th Cir. 1991)(The Eighth Circuit noted that the state representative payee automatically set aside $30 a month for the beneficiary's personal expenses and special needs. The Court emphasized that the state representative payee allowed beneficiaries to request that additional amounts be set aside from their benefits according to needs, and that "such requests have never been denied.").

II. WASHINGTON'S STATUTORY SCHEME STRIPS DSHS OF DISCRETION TO USE A CHILD'S SOCIAL SECURITY BENEFITS TO SERVE HIS OR HER INDIVIDUAL BEST INTERESTS, IN VIOLATION OF FEDERAL LAW

A. The Representative Payee Must Make an Individualized Inquiry into the Child's Best Interests

It is routine for Social Security and SSI recipients under age 18 to have payees appointed to receive benefits on their behalf. The payee has a distinct duty both to serve the best interests of the beneficiary and to uphold Congress's purposes in granting benefits under Title II and Title XVI of the Social Security Act. The Social Security Administration's ("SSA") "primary concern is to select the payee who will best serve the beneficiary's interests." 20 C.F.R. § 404.2021; 20 C.F.R. § 416.621. SSA's order of preference in selecting a payee reflects this concern, favoring potential payees who are likely to have personal knowledge of the child's best interests. *See* 20 C.F.R. § 404.2020(e); 20 C.F.R. § 416.620(e). However, when necessary, SSA will approve a social agency such as DSHS as representative payee.[5] This is done most often on behalf of foster children.

After the payee is appointed, federal law requires that a duly appointed representative payee:

> [u]se payments he or she receives *only* for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary [.]

20 C.F.R. § 404.2035(a); 20 C.F.R. § 416.635(a)(emphasis added).

In addition, for minor Title XVI recipients, the payee must:

> ensure that the beneficiary is and has been receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits [.]

20 C.F.R. § 416.635(e).[6]

The representative payee must make an individualized assessment of each child's needs in order to make the best interests determination that is required under both Titles of the Social Security Act. The ability of the representative payee to exercise discretion in its management of a child's Social Security benefits is fundamental to the overarching justification of the payee system. While the Commissioner

[5] At the formation of the Keffeler class, of the 1,480 Social Security beneficiaries under DSHS care, the SSA approved DSHS as representative payee for 1,411 of these children. *See Keffeler v. State of Washington Dep't. of Soc. & Health Servs.*, 32 P.3d 267, 271 (Wash. 2001).

[6] The payee's disbursement of the benefit must be guided by this duty to assess what services are medically necessary for this particular child. To assess a child's progress toward self-supporting adulthood and the improvement of the child's impairment, the SSA must conduct a review of the child's continued eligibility. *See* 42 U.S.C. § 1382c(a)(3)(H)(ii)(I). At the time of review, the representative payee must present evidence that it has used the child's funds to obtain treatment for the disabling condition that is the basis of benefits. *See* 42 U.S.C. § 1382c(a)(3)(H)(ii)(I). Similarly, Social Security regulations require that the representative payee "ensure that the beneficiary is and has been receiving treatment to the extent considered medically necessary...." 20 C.F.R. § 416.635(e).

must make a threshold determination that the representative will act in the child's best interests, this determination does not in any way relieve that payee of their ongoing duty to ensure that benefits are disbursed in a way that serves that particular child's best interests.

Moreover, because Social Security funds are intended to benefit only the entitled individual, and individual needs vary immensely, a representative payee must enjoy some degree of autonomy and discretion to assess the individual beneficiary's needs and distribute his or her benefits accordingly. This is particularly true of SSI: a youth is eligible not only based on economic need, but also because of an individual determination of disability.

Additionally, though Congress requires the Social Security Administration to establish accountability monitoring of representative payees, it does not authorize the SSA to dictate specifically how the beneficiary must use the funds. *See* 42 U.S.C. § 405(j)(3) (requiring the Commissioner of Social Security to obtain an annual accounting from individual payees and to establish a system of monitoring for State institutional payees; and authorizing the Commissioner to request an accounting upon suspicion of misuse); *see also* 42 U.S.C. § 1383(a)(2)(C). In other words, accountability monitoring respects the payee's discretion to determine the best interests of the child and to use the benefits accordingly. The discretion of the representative payee is bounded by the best interests standard and the purpose of the benefit.[7]

[7] Where Congress has provided statutory restrictions on the use of Social Security funds, the best interests requirement motivates all restrictions. For example, the anti-alienation provision of 42 U.S.C. § 407(a) that has received great attention in various stages of the *Keffeler* litigation, functions to protect the exclusive best interests requirement. The anti-alienation provision essentially prevents other interests from intruding upon the ability of the beneficiary or the representative payee to focus exclusively on meeting the beneficiary's current and foreseeable needs. Notably, the other interests that 42 U.S.C. § 407(a) seeks to exclude from claiming a stake in the beneficiary's funds are not just those interests that may be considered minor concerns from a public welfare perspective. Section 407(a) similarly prohibits both the corporate consumer credit lender and the needy child entitled to support from the beneficiary from using legal process to obtain satisfaction of the beneficiary's indebtedness. This contrast highlights the extent to which Social Security funds are fundamentally directed to the exclusive interest of the beneficiary. The needs and interests of the beneficiary's creditors and legal dependents are secondary, and the representative payee cannot address them until it has satisfied the current and reasonably foreseeable needs of the beneficiary. *See* 20 C.F.R. § 404.2040(c); 20 C.F.R. § 404.2040(d); 20 C.F.R. § 416.640(d).

B. Washington Law Precludes the Exercise of Discretion That is Needed to Conduct an Individualized Determination of the Child's Best Interests and Medically Necessary Services

Under Washington law, DSHS must use any income it receives on behalf of the child to reduce the burden on the state. Wash. Rev. Code § 74.20.010 (making it the responsibility of DSHS to "conserve the expenditure of public assistance funds, whenever possible, in order that such funds shall not be expended if there are private funds available or which can be made available by judicial process or otherwise ...").

By mandating that all funds be used to reimburse the state for the cost of foster care, Washington law thus affords DSHS no discretion to determine how benefits may serve Washington's youths' best interests or cover medically necessary services for SSI recipients. Because Washington law prevents DSHS from exercising this critical autonomy and individualized decision-making, it violates federal law. *See* Wash. Rev. Code § 74.20.010; Wash. Admin. Code § 388-25-0120.

While the state clearly has many duties to its citizens, it has the duty to serve *only* the best interests of the child when acting in its capacity as representative payee under federal law. By mandating that the fiscal interest of the state be a consideration in how the child's individual benefit is disbursed, DSHS is directed to exhaust a child's funds to pay for food, clothing, and shelter costs — items provided by the State regardless of reimbursement.[8] This results in a failure to consider the particular needs of Title II and SSI recipients, including the costs of medical and psychological treatment[9] not

[8] Under state law, Washington has a basic duty to "develop, administer, supervise, and monitor a coordinated and comprehensive plan that establishes, aids, and strengthens services for the protection and care of runaway, dependent, and neglected children." Wash. Rev. Code § 74.13.031(1).

[9] Under Washington law, the foster care stipend paid by DSHS to foster caregivers covers room, board, a clothing allowance, and personal incidentals. *See* Wash. Admin. Code § 388-25-0120. A foster care stipend does not cover all current maintenance needs; conspicuously, it leaves out medical expenses. Though foster children qualify for Medicaid, many medical expenses, such as certain mental health services, medical equipment, and orthodontics, are not covered by this basic health insurance. Therefore, in order to meet all current maintenance needs, DSHS cannot automatically reimburse itself for the entire amount of the child's benefit, but must first assess the child's unmet outstanding current maintenance and exercise discretion to determine the allocation that matches the best interests of the child.

Because DSHS has the duty to act in the best interests of the child, the unmet need of uncovered medical care should take priority over the met needs of food, clothing, shelter, and personal items. An example provided in the federal regulations illustrates this order of priority: the beneficiary's need for new shoes comes first over reimbursement to the agency that provides his basic care. *See* 20 C.F.R. § 404.2040(2)(b). This regulation demonstrates Congress's "clear intent that special needs of the beneficiary should take precedence over...reimbursement for care." *Keffeler*, 32 P.3d at 280.

covered by Medicaid.[10]

[10] In the many cases where Washington does use a child's entire benefit to reimburse itself, the benefit becomes a windfall to the state. When a child qualified for SSI also qualifies for Title IV-E foster care assistance, DSHS must make a choice between these sources of federal resources. Though a child can simultaneously maintain eligibility for both Title IV-E and Title XVI, Title IV-E dollars count as "income based on need" ("IBON"), which reduces the amount of the child's SSI benefit dollar-for-dollar. *See* 42 U.S.C.§ 1382a(a)(2) (counting non-exempted unearned income in income determination for SSI eligibility); *see also* Social Security Administration's POMS Manual § SI00830.170, available at *http://policy.ssa.gov/poms.nsf/lnx/0500830170* (describing types of income considered IBON); *id.* at § SI00830.410, available at *http://policy.ssa.gov/poms.nsf/lnx.0500830410* (explaining how SSA calculates Title IV-E payments as IBON against the amount of a beneficiary's SSI benefit). Therefore, if a child previously received the maximum benefit of $545 and Washington applies for Title IV-E dollars on the child's behalf, posting $200 itself and receiving a $200 match from the federal government (for a total $400 foster care stipend paid to the foster family), Washington would pay $200, receive $200 in federal funds, and have $145 of the child's funds to manage as representative payee. Alternatively, Washington may decide to refrain from receiving Title IV-E in order to maintain the child's SSI benefit level at $545. Under this scheme, Washington obtains more federal funding for itself by taking the child's entire benefit for reimbursement, and avoiding having to match $200 in order to receive federal funding. Therefore, by taking all of a child's money for the state as representative payee of SSI dollars, Washington attains $545, with no obligation to put up anything, whereas if it applied for Title IV-E, it could obtain only between $200-$345 for the state. The catch, of course, is that by deciding to rely on the child's SSI funding in order to increase the total funding transferred from federal to Washington State control, Washington places itself in the inappropriate position of *expecting* to spend the child's entire benefit to cover its cost of the foster care stipend, before considering whether reimbursing itself is in the child's best interests — whether the child has other pressing needs that will not otherwise be met under the state's vague duty to provide child welfare.

C. DSHS's Implementation of the Cost Recovery Scheme Prevents DSHS From Carrying Out its General Fiduciary Duty Under the Social Security Act

As set forth above, Washington law mandates that DSHS conserve the expenditure of state funds for foster care whenever other funding sources are available. Wash. Rev. Code § 74.20.010. While DSHS "*may* disburse" a child's funds for personal needs as the Secretary deems "proper and necessary," Wash. Rev. Code § 74.13.060 (emphasis added), no comparable state mandate ensures that funds available to the child under the Social Security Act first be used to meet the child's outstanding needs, over and above basic foster care before reimbursement. Nor does Washington exempt any portion of the benefit from the cost recovery scheme.[11]

DSHS employs an automatic self-reimbursement procedure: its Trust Fund Unit, which receives the child's monthly check from the Social Security Administration, immediately deposits the child's entire benefit amount into the

[11] Outstanding needs may include any of the several items that foster parents or institutional foster homes are not required to provide. The foster care stipend gives foster care givers the funds and the responsibility to provide room and board, clothing, and personal incidentals. *See* Wash. Admin. Code § 388-25-0120(1). Needs not covered by this amount are innumerable, but to name a few: medical needs not covered by Medicaid, home respite care, educational materials, home modifications, psychological treatment and evaluation, and parent-child visitation services. DSHS is not required to provide any of these services, and only does so "subject to the availability of funds." Wash. Admin. Code § 388-25-0170(1). As DSHS admittedly faces a budget crisis, (*see* Appellant's Application to Recall and Stay the Mandate of the Supreme Court of Washington Pending Cert. at 18, *Keffeler* (No. 01-1420)), it is likely in present circumstances that disabled foster children face multiple unmet needs, despite the fact that the federal government entitles these children to SSI funds precisely so they do not have to face this grave situation of unmet need.

Foster Care Trust Fund Account. *See Keffeler*, 32 P.3d at 272. The Trust Fund Unit is a division of the Office of Financial Recovery, whose primary responsibility is to pursue the state's fiscal interest by reducing taxpayer burden through recovery of funds spent by DSHS from outside federal and private sources. *See id.* at 276 n.13.

Thus, the same Trust Fund Unit that serves as the representative payee of a child's Title II or SSI benefits is also the *principal advocate of the fiscal interest of Washington.* As the trial court found, "*[f]or the sole purpose of obtaining reimbursement for foster care costs*, DSHS applies to the Social Security Administration to be appointed representative payee for all children in foster care who are eligible for social security benefits." *Id.* at 274 n.11 (*quoting* Clerk's Papers (CP) at 623 (Trial Court's Mem. Op. (Sept. 29, 1998) at 3)(emphasis in original)). Indeed, Washington reduces its request for appropriations under the state budget for child welfare expenses based upon the amount of funds it expects to receive as payee for child beneficiaries of Title II and SSI.[12]

[12] Deposits by the Trust Fund Unit into an individual subsidiary account to cover the child's current unmet needs or reasonably foreseeable needs are a rare exception to its automatic cost recovery scheme. Essentially, the availability of a child's Social Security funds to serve his or her outstanding needs is entirely dependent on the initiative and extra-ordinary effort of the child's social worker to navigate an unadvertised and convoluted process, and thereby halt the hurtling machine of cost recovery. In order to obtain a disbursement for special needs, the social worker must first learn through independent channels that such an option even exists for the child: DSHS makes no affirmative effort to inform the social worker of the possible availability of Social Security benefits to the child — funds that the federal government has granted individually and for the sole benefit of that child. *See* Resp't Br. in Opp'n at 27, *Keffeler* (No 01-1420). If the social worker is savvy enough to check for this funding, he or she must then file a form with the Children's Administration. The request must pass through two levels of approval, one within the Children's Administration and another within DSHS's Office of Financial Recovery, which has no contact with the child.

The special needs of a child under the care of DSHS are rarely met by his or her Social Security or SSI funds, though the federal government has explicitly provided these funds for the individual's sole use and benefit. *See* 20 C.F.R. § 404.2035(a); 20 C.F.R. § 416.635(a). In a random sampling of 48 accounts of children receiving Title II or Title XVI benefits, DSHS disbursed only 3% of the child's funds to meet the many needs not met by the stipend for basic foster care. Thirty-eight of the children in the sampling never received any of their own Social Security funds to meet their individual needs. In Danny Keffeler's case, DSHS used 100% of his $4,998 in Social Security benefits to reimburse itself. *See* Appendix to Resp't Br. in Opp'n at A-60 ¶, *Keffeler* (No. 01-1420).

By elevating the fiscal solvency of the state over the child's best interests, DSHS fails to meet the child's needs. This is contrary to the Social Security Act. *See Jarvis v. Bowen*, 1986 Unempl. Ins. Rep. (CCH) ¶ 83,379 (D. Minn. 1986)("The representative payee must remember that all expenditures must be in the best interests of the beneficiary, not the State of Minnesota.").

III. WASHINGTON'S COST RECOVERY LAWS VIOLATE THE SUPREMACY CLAUSE BECAUSE THEY STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS

A violation of the Supremacy Clause, U.S.C.A. Const. Art. 6, cl. 2., exists where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As discussed in Section I, the Social Security Act, its regulations, and its legislative history provide much guidance

with respect to Congress's purpose in establishing benefits for minors under Titles II and XVI of the Social Security Act. Washington's cost recovery laws, implemented to require full reimbursement of foster care costs without any consideration of the youths' special needs, undermine Congressional purpose.[13]

Congress intended that child SSI benefits be used to address the special needs of youth who are determined to be disabled under the high standard established in the Social Security Act. While discretion is given to the representative payee to determine what will serve the youth's best interests, Congress made clear the payee has a duty to meet the youth's treatment needs and make an individualized determination of how the beneficiary's special needs should be met.

At the formation of the *Keffeler* class, DSHS served as representative payee to 923 children receiving Supplemental Security Income under the Title XVI program. *Keffeler*, 32 P.3d at 271. In making this commitment to these children, DSHS undertook an essential role in realizing Congress's founding purpose for this program: to assist the most disadvantaged of all Americans in providing treatment for their impairments and disabilities and developing their abilities to

[13] *Cf. Boggs v. Boggs*, 520 U.S. 833, 841 (1997), where this Court held that a state law's frustration of Congress's goal under the Employee Retirement Income Security Act (ERISA) to ensure a stream of income to surviving spouses is enough to find the state law preempted under the conventional conflict preemption principles. *Id.* at 843 ("ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity."). Significantly, the Court focused on ERISA's detailed provisions designed to protect the beneficiary's income against non-beneficiary interests, including an anti-alienation provision and a requirement that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participant and beneficiaries." *Id.* at 845.

become self-supporting adults. *See* H.R. Rep. No. 92-231, pt. 2, at 5133-34. Washington subverts Congress's goal of providing special assistance to our neediest children by substituting its own interest in cost recovery as the primary objective of its representative payeeship.

Likewise, Congress intended that Title II benefits be used in the child's best interests and based on an individualized consideration of the youth's special needs, which may exceed current maintenance. Thus, Washington law stands as an obstacle to Congress's goal of providing for the best interests of youth whose parents are disabled in its implementation of its cost recovery law.

IV. WASHINGTON'S COST RECOVERY POLICIES GIVE ELIGIBLE CHILDREN NO BENEFIT WHEN THE STATE SERVES AS THEIR REPRESENTATIVE PAYEE

The state of Washington and its *amici* maintain that the decision below, if sustained, would undermine the well-being of disabled children in foster care.[14] Underpinning the State's argument is an implicit trade-off: the state may use its authority as representative payee to re-pay itself for foster care expenses, and in return, it will provide essential services which would not otherwise be available to foster children. Stated another way, by pursuing its own interest, the state claims to indirectly serve the interests of abused and neglected children

[14] The brief of *amici* Children's Defense Fund, et al., ("CDF") notes, "...if it were not for the effort of these state agencies, the disabilities of many children might go unrecognized, and they would never be determined eligible for- or actually receive benefits. Simply put, many of these children have no relative or friend to apply for benefits or act as representative payee. The state agencies willingness to serve as payee is essential to these children receiving benefits." *Amici* Br. of CDF at 21.

in state care.

This trade-off is a bad bargain for poor children. It overlooks the fact that these needy children are entitled to the benefits for which the state is seeking payment. Additionally, the bargain typically gives them little, and often nothing, in return for forfeiting their entitlement. Finally, the policy violates the spirit and the letter of applicable law, in part by transforming individuals' private entitlements into a public funding stream.

A. Washington has Independent Federal and State Statutory Duties to Assess, Protect, Care For and Educate All Foster Children

The policy of trading-off individuals' social security benefits for child welfare services is premised on the notion that the state cannot, or will not, shoulder the burden of assessing foster children and applying for social security benefits on their behalf unless the state can recover its costs through the representative payee system.[15] This premise disregards the larger context within which the State cares for neglected and abused children.

Washington has a broad mandatory duty under federal and state laws to provide care, safety, health services, education,

[15] The court below, as well as the trial court, took a step further finding, "for the sole purpose of obtaining reimbursement for foster care costs, DSHS applies to the Social Security Administration to be appointed representative payee for all children in foster care who are eligible for social security benefits." *Keffeler*, 32 P.3d at 275 n.1. The Washington Supreme Court summarized the matter thus: "DSHS receives reimbursement for foster care only if it serves as a representative payee, and it only serves as representative payee so it can confiscate the child's money." *Id.* at 274-75.

and more to foster children. These services are owed to abused, neglected, and disabled children in state custody as a matter of right. They cannot be withheld based on a child's inability – or even unwillingness – to pay for them.

1. Washington has a federally mandated duty to provide for a foster child's best interests, including special needs

The preeminent duty owed abused and neglected children is to protect them from further harm and provide for their care. In 1980, Congress enacted the Adoption Assistance and Child Welfare Act ("AACWA"), establishing a new part to Title IV of the Social Security Act to provide foster care and adoption assistance to the states, for the purposes of improving the quality of care provided to foster children, reducing the number of children removed from their homes and placed in substitute care, returning children to the homes as soon as conditions permit, and facilitating adoption or other permanent placement for children who cannot be returned to their homes. 42 U.S.C. § 670-679b. In 1997, Congress passed the Adoption and Safe Families Act ("ASFA"), that amended AACWA to prioritize adoptions over family reunification. This clearly established that the child's health and safety is paramount in policy making. Pub.L. No. 105-89.

Washington has codified these federal policy goals as legal responsibilities. State law requires the Department to "[d]evelop, administer, supervise, and monitor a coordinated and comprehensive plan that establishes, aids, and strengthens services for the protection and care of runaway, dependent, or neglected children." Wash. Rev. Code § 74.13.031 ("Duties of the Department"). The purpose of these duties "is to safeguard, protect and contribute to the welfare of the children

of the state, through a comprehensive and coordinated program of public child welfare services providing for: social services and facilities for children who require guidance, care, control, protection, treatment or rehabilitation." Wash. Rev. Code § 74.13.010 ("Declaration of Purpose").

This duty includes the duty to identify and treat a child's special needs. This obligation exists regardless of whether or not the child welfare agency is fully reimbursed for care or regardless of the funding stream that provides the reimbursement; it is implicit in the agency's responsibility to provide for the safety and well-being of dependent children.

2. Washington has a federally mandated duty to identify, assess and treat disabled children

a. Washington has a federally mandated duty to identify, assess and treat all foster children under Medicaid's EPSDT program

In addition to its obligations to adequately care for abused and neglected youth under state and federal child welfare statutes, Washington has a duty to assess and treat eligible children under Title XIX of the Social Security Act, more commonly known as Medicaid. Foster children in Washington are eligible for Medicaid and its comprehensive child treatment and prevention program Early, Periodic, Screening, Diagnosis, and Treatment ("EPSDT"). *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r) (as added and amended by the Omnibus Budget Reconciliation Act of 1989). The program provides a comprehensive health screening, diagnosis and treatment regime for covered children.

Under EPSDT, four discrete types of assessments are provided at every screening: medical (physical and mental health), vision, hearing and dental, as well as immunizations and other preventative care. 42 U.S.C. §§1396a(a)(43), 1396a(a)(62), 1396d(r), 1396s (as added and amended by the Omnibus Budget Reconciliation Act of 1993). Covered children are statutorily required to be screened both at preset periodic intervals and whenever a problem is suspected. *See* 42 U.S.C. §§1396a(a)(43), 1396d(r).

Therefore, the foster children in the State of Washington's care must be routinely screened for physical and emotional defects under EPSDT. These regular, mandatory screenings are specifically designed to bring to light those disabilities that the Petitioner claims "might go unrecognized." Pet'r Br. at 23. Indeed, the health data that is gathered in these assessments could provide the medical basis for SSI applications. Additionally, EPSDT requires that a covered child receive diagnostic evaluations and any necessary health care, treatment or additional services, as described at 42 U.S.C. §1396d(a), to "correct or ameliorate" a physical or mental illness. 42 U.S.C. §§1396a(a), 1396d(r)(5). As the guardian of the child, Washington has the statutory duty to meet the health needs of children in its care. Washington's DSHS agency is charged not only with implementing EPSDT for all eligible children, but also with the duty of ensuring that the children in its care are screened, diagnosed and treated under EPSDT.

b. Washington has a federally mandated duty to identify, assess and treat all disabled children's educational needs under IDEA

Washington also has an affirmative duty under the Individuals with Disabilities Education Act ("IDEA") to

identify, assess, and treat children with disabilities relating to education. 20 U.S.C. §1400 *et seq*. In 1975, Congress enacted IDEA to provide the states with funding to create and develop programs to provide eligible disabled children with a Free Appropriate Public Education ("FAPE"). By submitting an application and accepting federal IDEA funds, the state of Washington made a promise to provide a FAPE to its disabled children in the manner set out in the statute and regulations. 34 C.F.R. § 300.121(a).

IDEA requires local school districts to seek out disabled children. Washington codified this mandate, requiring local districts to conduct affirmative "child find activities" for the purpose of locating, evaluating and identifying students with a suspected disability. Wash. Admin. Code § 392-172-100. A referral of a student suspected of having a disability by a parent, medical personnel, teacher, or any other interested person triggers a full and complete disability evaluation. This mandatory, comprehensive assessment can include an evaluation of health, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. *See* 20 U.S.C. § 1414; Wash. Admin. Code § 392-172-100 *et seq*.

If the child is determined to be eligible for special education and IDEA-related services, the evaluation data is then used to develop the child's individualized education plan. The plan outlines the additional services to which the disabled child is entitled under the statute, serving as the framework for the state of Washington to meet its duty to provide.

Under IDEA and the associated state rules for the provision of special education, Washington has an ongoing duty to identify, evaluate, and provide services to disabled children.

Wash. Admin. Code § 392-172-100. The state's duty to meet the educational needs of disabled children and thereby provide a FAPE to all students, accomplishes many of the same screening and evaluation goals of Washington's SSI applications unit.

3. Washington has other reasons to apply for social security on behalf of foster children

The aforementioned statutes and programs evince foster children's entitlement to assessments, treatment and services without regard to their social security status.

While there is no similar mandatory duty to establish eligibility for SSI or Social Security benefits for youth committed to its care, Washington has compelling reasons to assess need and apply for social security benefits for eligible children quite aside from whether or not the state may use individuals' social security benefits to pay for its foster care program.

For example, *amici* CDF, point out that establishing eligibility "may help make it easier for [a] child to reunify safely with his or her family" and "[r]eceipt of benefits may also help to facilitate adoptions...." *Amici* Br. of CDF at 23. Returning children home or facilitating adoption is a primary and consistent goal of federal foster care legislation. *See* 42 U.S.C. § 670 *et seq*. The Washington legislature has also expressed its commitment to reducing length of stay, recognizing that "the number of children entering out-of-home care is increasing and that a number of children receive long-term foster care protection. Reasonable efforts by the department to shorten out-of-home placement or avoid it altogether should be a major focus of the child welfare

system." Wash. Rev. Code § 74.14C.005(1). Since social security benefits help reunification and adoption placement, applying helps Washington satisfy its broader duties.

Furthermore, establishing eligibility will be in the best interests of a youth with special needs and will contribute to his or her well-being, in terms of placement options and rehabilitation. Reducing the period of time a child is in state care also will reduce outlays of state funds.

B. Washington has Difficulty Meeting the Basic Needs of Foster Children

Washington and its *amici* claim that the ruling below will prevent Washington and other states from becoming representative payees for foster children. Because "*there is no one else to act in that capacity*," petitioners predict that where the state will not serve, eligible children will go without. *Amici* Br. of CDF at 21 (emphasis in original). Absent a representative payee, *amici* CDF contend that many children in foster care won't receive their benefits or the special attention that is now directed to their disabilities need. *See id.* at 22.

Aside from applying for benefits, the most important service Washington might provide to social security recipients in state care is taking special efforts to meet their individual needs. Disabled foster children, especially, have enormous personal needs.

But the evidence indicates that Washington does not use children's social security benefits for this purpose. Indeed, the state's cost recovery program virtually precludes consideration of an individual child's best interests, and is a barrier to

addressing special needs. The court below concluded that any other payee would better suit Washington children's needs*See Keffeler*, 32 P.3d at 275.

The results of Respondents' sampling of 48 individual cases demonstrates that very little financial benefit is conferred on disabled children as a result of DSHS's service as representative payee. *See* Resp't Br. at 9. Additionally, DSHS's procedures provide no easy access to social security benefits for disabled children, foster parents, or social workers. *See* Resp't Br. at 9. The most disturbing evidence of the state's failure to meet Washington's foster children's special needs is the state's inability to meet their *most basic* needs. The National Center for Youth Law, along with local Washington counsel, recently won a sweeping injunction against Washington to remedy the State's failure to provide safe or stable placements or necessary medical care, among other things, to a broad class of children in state care. *See Braam v. State of Wash. Dep't. of Soc. & Health Servs.*, No. 98-2-01570-1 (Whatcom County Super. Ct., May 31, 2001).

C. Washington Policies Put the Individual Entitlements of the State's Neediest Children to Unauthorized Uses

1. Washington compensates itself as representative payee in violation of federal and state policy

Under the Social Security Act, Congress authorized representative payees to use benefits to offset administrative expenses. The set-off, however, is limited to the "lesser of 10 percent of the monthly benefit involved, or $25.00 per month." 42 U.S.C. §§ 405(j)(4)(A)(i)(I)-(II), 1383(a)(2)(D)(i)(I)-(II).

Under Washington law, the Secretary is directed to serve as representative payee for children placed with DSHS "without compensation." Wash. Rev. Code § 74.13.060. In Danny Keffeler's case, the state's willingness to serve as representative payee cost his entire social security grant of approximately $5000. *See* Resp't Br. at 10 n. 12. Based on a sampling of individual cases, his experience is not unusual. Indeed, disabled children in state custody on average received three pennies on the dollar in individual benefits when the state of Washington managed their social security funds. *See* Resp't Br. at 9. Most received no individual benefit at all.

The state takes the position that the benefits were used, not for administrative expenses, but for current maintenance. But, there is no escaping the fact that if the state is prohibited from using benefits for current maintenance, it will cut the representative payee service, not basic foster care. The linkage is crystal clear – social security benefits underwrite representative payee services. Just as clearly, this policy flouts federal and state restrictions on representative payee compensation.

2. Washington's cost recovery policy improperly transforms private entitlements into a public funding stream

Washington is concerned that the decision below will bar Washington from using social security benefits as a federal funding stream for its child welfare program.

> [A] reduction in DSHS's role as representative payee does [mean] that, without the offset, there will be fewer resources for *all* of the children in foster care in Washington.

Amici Br. of CDF at 22.

This is an extraordinary recognition – that the individual property of the neediest foster children may be commandeered for use as a public funding stream. Nothing about the representative payee provision suggests that Congress intended this result. Yet Washington clearly uses its fiduciary position as representative payee to aggregate individual social security benefits into what amounts to a federal funding source. As Respondents point out, each year Washington calculates the amount of social security benefits it expects to take in, and lowers the state's child welfare appropriation in a like amount. *See* Resp't Br. at 8-9.

Absent some clear indication from Congress that personal entitlements may be put to this use, such a confiscatory policy ought not to be sustained. The State cannot justify transferring its financial obligation to provide for all the State's neglected and abused children onto the backs of the neediest few.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center and National Center for Youth Law respectfully submit that the decision of the Washington Supreme Court be upheld.

Respectfully submitted,

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